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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 645

JOHN DAVIS,

Petitioner,

—v.—

MISSISSIPPI.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinion Below

The opinion of the Supreme Court of Mississippi is reported at —— Miss. ——, 204 So.2d 270 (1967).

Jurisdiction

Jurisdiction of this Court is based upon 28 U.S.C. §1257 (3), petitioner having asserted below and asserting here the deprivation of rights, privileges, and immunities secured by the Constitution of the United States.

The judgment of the Supreme Court of Mississippi was entered November 6, 1967 (A. 65), and petitioner's suggestion of error was overruled December 11, 1967 (A. 68).

Petitioner's timely petition for writ of certiorari was filed March 7, 1968, and granted October 14, 1968 (A. 69).

Constitutional Provisions Involved

This case involves the Fourth Amendment and Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Question Presented

Whether the introduction into evidence at petitioner's criminal trial of his fingerprints, taken as a result of petitioner's illegal arrest, violated petitioner's rights under the Fourth and Fourteenth Amendments?

Statement of the Case

On December 3, 1965, petitioner John Davis a 14 year-old Negro boy living with his parents in Meridian, Mississippi was one of some 65 to 70 Negro males taken into custody by the Meridian police for questioning in connection with a complaint of rape by an elderly white woman (A. 6-7, 9-11).[1] The police had neither sought nor obtained a warrant for his arrest (A. 6-7, 10). Nor is there any indication as to what cause, if any, led the police to include petitioner in their dragnet—beyond the fact that the woman stated that her assailant was a Negro boy of uncertain description (A. 57; 204 So.2d at 274). Petitioner was taken to police headquarters, questioned, fingerprinted and re-

[1] The record does not make clear whether some of the 65 to 70 Negro males taken into custody were actually taken into custody on days immediately following December 3rd.

leased (A. 6-7, 47). These fingerprints were never analyzed or introduced into evidence (A. 46-48).

Between December 3rd and 7th, petitioner was taken into custody—in the words of the juvenile officer—"about 4 or 5 times . . . in an attempt to get leads on boys that were working up in this section where the crime occurred" (A. 10-11).[2] Petitioner was questioned sometimes at police headquarters, sometimes in a police car (A. 58; 204 So.2d at 274); on several occasions petitioner was brought to the hospital and exhibited to the woman "for a gauge to go by on size and color" (A. 11). On none of these occasions was the woman able to positively identify petitioner as her assailant (A. 51). None of these 4 or 5 detentions was effected pursuant to a warrant (A. 11), nor was petitioner afforded counsel or an opportunity to have his parents present (A. 8-11).

Petitioner was again taken into custody without a warrant on December 12, 1965; this time he was driven to Jackson, a distance of 90 miles, and incarcerated overnight in the Jackson city jail (A. 8, 10). The following day, he was given a lie detector test in the absence of counsel and parents (A. 12-13).[3] Thereafter, petitioner signed a statement,[4] and was returned to jail in Meridian (A. 13, 48).

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[2] The court below found that "a substantial portion of the interrogation dealt with an effort on the part of the officers to gain information as to others who might have committed the crime" (A. 58; 204 So.2d at 274).

[3] The juvenile officer testified to the circumstances leading up to the giving of the lie detector test as follows (A. 12):

> Q. At whose instance or request was this done?
> A. I discussed it with his mother, and she seemed to feel like we were worrying him and she suggested that we take him and get it over with, was her words.

[4] The statement itself was not introduced into evidence, but came before the jury when the complaining witness testified "he confessed it all" (A. 29).

On December 14th, while still in police custody, petitioner was again fingerprinted (A. 13-14, 45-48). The same day these fingerprints, together with the prints of approximately 23 other Negro males picked up in the dragnet who were still under suspicion, were forwarded to the FBI laboratory for comparison with latent prints taken from the woman's home (A. 38-39, 46-47).[5]

Petitioner was subsequently charged with rape and indicted therefor in May, 1966 by the grand jury of Lauderdale County.[6]

At his trial in the Circuit Court of Lauderdale County, petitioner moved to suppress the introduction into evidence of his fingerprints as violative of his rights under the Fourth and Fourteenth Amendments (A. 3-5). Following a preliminary examination (A. 6-15), this motion was denied (A. 15).

The prosecution introduced fingerprint exhibits showing the correspondence of petitioner's fingerprints to latent prints taken from the woman's house (A. 35, 45).

The only other evidence against petitioner was the woman's testimony that petitioner had done yardwork for her (A. 17, 26-27) and her description of the attack (A. 22-23):

> Q. If you will, Mrs. Key, turn and face the jury so they can hear you and tell us, you said he was pushing

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[5] The woman was assaulted in her home; the latent prints were lifted from the window (A. 33).

[6] The indictment was quashed by the Circuit Court of Lauderdale County on grounds of systematic exclusion of Negroes from the jury. On November 15, 1966, petitioner was reindicted and the following day he entered a plea of not guilty (A. 1-2).

up your clothes, tell us what was said by either of you, if anything, and what happened at that time?

A. Well. Well, I will have to think a minute. At one time I told him he was killing me, and then he started different. And after while, when he got up he says, well, he asked me, there is a bed in there and did I want him to get on top. And after he had got up, he said, "Do you feel like an old lady now?" And I asked him did he want the money before he left. I says, "It's in another room" and he pulled [a headpiece] over the flashlight he had, I suppose, because I could see his face, and I recognized him.

Q. Now, who did you recognize, Mrs. Key?

A. I recognized it was Johnny, I thought it was, but I wasn't perfectly sure right then, but then I knew nobody else had been in the house but him. I asked him to carry a table through the kitchen, where he threw the light, where the meter was.

Q. Mrs. Key, I ask you to look at the defendant and tell me when you say "Johnny," are you referring to the defendant John Davis?

A. Over yonder in that white shirt, yes sir, that's him.

Q. All right.

A. No doubt in my mind about it.

At the close of the prosecution's case, petitioner moved for a directed verdict on the ground that the evidence, either with or without the illegally obtained fingerprints, was insufficient to go to the jury (A. 49-50). The Court denied the motion, saying (A. 50):

The Court has reexamined the *Mapp* case, but the Court does find there is sufficient material here, even

> in the face of examination the Court made, to warrant a jury finding. There are some elements evidentiary in nature in the case that will bear some considerable close inspection, but under the rules of the laws of the State of Mississippi, this Court feels that the State has made a case and that the case should go to the jury at this point.

Petitioner was convicted and sentenced to life imprisonment (A. 52).

The Supreme Court of Mississippi affirmed, holding that the introduction into evidence of petitioner's fingerprints did not violate his rights under the Fourth and Fourteenth Amendments because:

1. The fingerprints were not the product of an arrest (A. 59; 204 So.2d at 275);[7] and,

2. In any event, fingerprints taken as a result of an illegal arrest are not subject to the exclusionary rule enforcing the Fourth and Fourteenth Amendments (A. 59-62; 204 So.2d at 275-77).

Petitioner's suggestion of error stressed that his fingerprints were the product of his arrest of December 12th (see note 7, *supra;* A. 66), but it was summarily overruled (A. 68).

On October 14, 1968, the Court granted certiorari to review this holding (A. 69).

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[7] The court assumed that the fingerprints were the product of petitioner's detention of December 3rd (A. 57-59; 204 So.2d at 274-75), but that assumption was erroneous (see pp. 2-3, *supra*). The fingerprints were the product of petitioner's detention of December 12th (see pp. 3-4, *supra*), which the court conceded was an arrest (A. 58; 204 So.2d at 274).

ARGUMENT

Petitioner's Fingerprints Were the Product of His Illegal Arrest and Were Introduced Into Evidence at His Criminal Trial in Violation of the Fourth and Fourteenth Amendments.

A. Petitioner Was Illegally Arrested

Petitioner was initially taken into custody by Meridian police on December 3, 1965. He was detained at police headquarters, interrogated and released. Thereafter, prior to December 12th, he was taken into police custody, detained and interrogated on 4 or 5 occasions. On December 12th, petitioner was again taken into police custody, incarcerated 90 miles away and subjected to a lie detector test.

The court below held that petitioner's detention of December 3rd did not amount to an arrest "within the accepted legal meaning of the word," because:

1. Petitioner "was merely escorted to headquarters for interrogation, as in fact were numerous others, in the course of an investigation by police of an unsolved major crime"; and,

2. "[T]here was no intention to arrest" (A. 59; 204 So.2d at 275).

Petitioner submits that he was arrested, on December 3rd and thereafter,[8] within the "accepted legal meaning" of

[8] The court below conceded that petitioner's detention of December 12th was an arrest (see note 7, *supra*). But the court below stands ready to approve the introduction into evidence of petitioner's fingerprints taken on December 3rd, should there be a retrial.

that term. Only last Term, in *Sibron* v. *New York*, 392 U.S. 40, 67 (1968) (Peters case), this Court had occasion to again consider the definition of an arrest:

> [I]t is clear that the arrest had for purposes of constitutional justification already taken place before the search commenced. When the policeman grabbed Peters by the collar, he abruptly 'seized' and curtailed his freedom of movement on the basis of probable cause to believe that he was engaged in criminal activity. See *Henry* v. *United States, supra* at 103. At that point, he had the authority to search Peters . . . .*

In this case, the police obviously did more than grab petitioner and curtail his freedom of movement. The police took petitioner into custody and detained him at police headquarters. This certainly was an arrest. See W. LaFave, *Arrest—The Decision to Take a Suspect Into Custody*, pp. 4-5 (1965).

Petitioner's arrest cannot be converted into a detention requiring less than probable cause by the court below's form of words ("merely escorted to headquarters for interrogation"). If that formulation is intended to suggest that petitioner consented to his detention, it is wholly unsupported by the record. At the very least, the State would have the "burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority" (*Bumper* v. *North Carolina*, 391 U.S. 543, 548-49 (1968)).

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* The citation to *Henry* v. *United States*, 361 U.S. 98, 103 (1959) referred to the following holding: "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this case, was complete."

Nor can petitioner's arrest be converted into a detention requiring less than probable cause by the statement that the police had no present intention to charge petitioner with crime. Arrests for investigation are apparently widespread, but they are by no means legal. The President's Commission on Law Enforcement and the Administration of Justice, in its Task Force Report, The Police, found (p. 186):

> Although there is no legal basis for arresting persons simply as a means of detaining them while an investigation of their possible involvement in crime is conducted, this has been a common practice in a number of departments.

And Professor Herbert L. Packer, in his recent book, *The Limits of the Criminal Sanction* (Stanford University Press, 1968), states:

> The prototype of the outright violation [of the principle of legality] is the arrest 'for investigation' or 'on suspicion.' The ideal of the law of arrest is that no person may be deprived of his freedom, even momentarily, unless there is probable cause to believe that he has committed a crime. But that ideal is flouted in practice hundreds of times every day. People who arouse the suspicion of police that they may be up to no good are taken into custody—sometimes only for a few minutes, sometimes for days or even weeks—out of a variety of preventive motives. The most nearly respectable such motive is that upon interrogation it will turn out that these people have in fact committed an offense for which they can be duly charged, even though the formal grounds for arrest are lacking (p. 98).

This widespread police illegality has a corrosive effect upon the community and leads, concluded the President's Commission, to hostility and disorder (*Task Force Report, The Police,* pp. 186-87).

There is simply no basis in the Fourth Amendment for the holding that petitioner was properly detained at headquarters on less than probable cause because the police were merely investigating him. Such an interpretation would make a mockery of the Fourth Amendment, whose protection turns upon the actual restraint placed upon the citizen's liberty, not upon the police officer's state of mind. Such an interpretation would signal a return to the regime of the general warrant, which "perpetuated the oppressive practice of allowing the police to arrest and search on suspicion" and which it was the design of the Fourth Amendment to extirpate (*Henry* v. *United States, supra,* 361 U. S. at 100).

Petitioner's arrests were illegal for three reasons. First, as we have seen, he was arrested for investigation—a circumstance explicitly negativing the existence of probable cause.[10] See *Staples* v. *United States,* 320 F.2d 817 (5th Cir. 1963); *Manuel* v. *United States,* 355 F.2d 344, 348 (5th Cir. 1966).

Second, there was in fact no showing of probable cause for petitioner's arrests. Indeed, there was no showing of

[10] The standard of probable cause was articulated in *Beck* v. *Ohio,* 379 U.S. 89, 91 (1964), as follows: "Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."

any cause to include petitioner in the police dragnet—beyond the fact that he was a local Negro boy. Petitioner was arrested, in the words of the arresting officer, "in an attempt to get leads." Prior to petitioner's last arrest of December 12th, petitioner was exhibited to the woman "for a gauge to go by on size and color," but she was unable to positively identify petitioner as her assailant. In sum, there was no showing that the police had any more cause to arrest petitioner on December 12th than they had on December 3rd—and that was clearly insufficient to justify any kind of detention. Indeed, on December 14th, there were still 23 other Negro youths sufficiently under suspicion to send their fingerprints to Washington for analysis.

Third, petitioner's arrests, or at the very least his arrest of December 12th, must be condemned because the police had not applied for or obtained an arrest warrant and had no good excuse for not doing so. It is true that this Court has from time to time sustained arrests made on probable cause but without an arrest warrant. See *Draper* v. *United States*, 358 U.S. 307 (1959); *McCray* v. *Illinois*, 386 U.S. 300 (1967). But this Court has never done so on a record such as this, which shows that the police had abundant time and opportunity to obtain a warrant if they thought they had probable cause to support one.[11] Decisions on probable cause, this Court has repeatedly held, are to be committed to the deliberate, impartial judgment of a judicial officer.[12] Only last Term, this position was re-

[11] Some courts have treated the failure to obtain a warrant as the basis for an inference that the police lacked probable cause. See *Carter* v. *United States*, 314 F.2d 386, 388 (5th Cir. 1963).

[12] In *Beck* v. *Ohio*, *supra*, 379 U.S. at 96, this Court held:

> An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause and

affirmed in *Terry* v. *Ohio*, 392 U.S. 1, 20 (1968): "We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure . . . or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances." There were clearly no "exigent circumstances" in this case.

B. Petitioner's Fingerprints, Having Been Illegally Obtained, Should Have Been Excluded From Evidence at His Criminal Trial.

The court below held that petitioner's fingerprints, however obtained, were properly admitted into evidence because fingerprints are excepted from the operation of the exclusionary rule enforcing the Fourth Amendment. The Court apparently reasoned that fingerprints are excepted from the exclusionary rule because they are "authentic" (A. 61-62; 204 So.2d at 277):

> In the case here, nothing the police did or could ever do would alter in the slightest degree the configuration of [petitioner's] fingerprints, nor cause them to be other than peculiar to himself, and different from those of all others. The act of taking fingerprints is

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substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.

See also *Wong Sun* v. *United States*, 371 U.S. 471, 481-82 (1963):

> The arrest warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause.

> quite different in its essential nature from the obtaining of a confession, the authenticity of which becomes suspect by reason of coercion, real or supposed, to which the suspect may be subjected while under the constraint of an allegal arrest. We think the evidence of [petitioner's] prints was properly admitted.

This holding misconceives the policy of the Fourth Amendment and the function of the exclusionary rule.

The policy of the Fourth Amendment is to protect the individual's right to privacy: "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State" (*Schmerber* v. *California*, 384 U.S. 757, 767 (1966)).[13]

The function of the exclusionary rule is to deter the police from trenching upon Fourth Amendment rights by removing their incentive to do so. *Mapp* v. *Ohio*, 367 U.S. 643, 655-56 (1961); *Linkletter* v. *Walker*, 381 U.S. 618, 636-37 (1965); *Terry* v. *Ohio*, *supra*, 392 U.S. at 12. "[W]ithout that rule, the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom 'implicit in the concept of order and liberty'" (*Mapp* v. *Ohio*, *supra*, 367 U.S. at 655)).

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[13] See also *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967): "The basic purpose of [the Fourth] Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials."

The search in *Schmerber* was conducted pursuant to a *legal* arrest (see 384 U.S. at 768-69). No claim of a violation of Fifth Amendment rights is raised in this case.

Accordingly, the nature of the fruit of an illegal arrest, let alone its authenticity, is irrelevant to the operation of the exclusionary rule. Just as the exclusionary rule makes no distinction between "mere evidence" and "contraband" seized pursuant to an illegal arrest (*Warden* v. *Hayden*, 387 U.S. 294, 301-02 (1967)), nor between "physical" and "verbal" evidence (*Wong Sun* v. *United States*, 371 U.S. 471, 485-86 (1963)), the exclusionary rule makes no distinction between "unauthentic" and "authentic" fruits of an illegal arrest. It is not what the police seized, but whether they seized it illegally that matters for Fourth Amendment purposes. Evidence is to be excluded if its exclusion is necessary to deter illegal police conduct; or, put another way, at the very least, evidence is to be excluded if its admission would provide an incentive to illegal police conduct.

This need to deter unwarranted intrusions by police officers upon the individual's privacy and dignity is not affected by the fact that the product of the unwarranted intrusion is a gambling slip (see *Beck* v. *Ohio*, *supra*), an admission (see *Wong Sun* v. *United States*, *supra*), narcotics (see *Sibron* v. *New York*, *supra*) or fingerprints (see *Bynum* v. *United States*, 262 F.2d 465 (D.C. Cir. 1958)).

Bynum, *supra*, cited with approval in *Wong Sun*, *supra*, 371 U.S. at 486, n. 12, is squarely in point. The Court of Appeals there held that the exclusionary rule required the exclusion from evidence of fingerprints taken as a result of an illegal arrest, on reasoning which is fully applicable here (262 F.2d at 466-67):

> It is well settled that an article taken from the person of an individual on the occasion of an illegal arrest

is not admissible in evidence against him, although it is relevant and entirely trustworthy as an item of proof [citing cases]. Again, if the police have obtained a statement from an accused person during his illegal detention, no showing that the statement has been obtained without coercion and actually recorded can make it admissible, although it may seem to be a trustworthy and patently relevant voluntary statement [citing cases]. In these situations, it is deemed a matter of overriding concern that effective sanctions be imposed against illegal arrest and detention and the risks of overreaching inherent in such action. Even though highly probative and seemingly trustworthy evidence is excluded in the process, this loss is thought to be more than counterbalanced by the salutary effect of a forthright and comprehensive rule that illegal detention shall yield the prosecution no evidentiary advantage in building a case against the accused. All of this is bottomed on the Constitution itself. The Fourth Amendment makes protection of the individual against illegal seizure or arrest a constitutional imperative. In the cited cases judicial authority over the manner on which justice shall be administered is exercised in a way calculated to implement the constitutional guarantee.

True, fingerprints can be distinguished from statements given during detention. They can also be distinguished from articles taken from a prisoner's possession. Both similarities and differences of each type of evidence to and from the others are apparent. But all three have the decisive common characteristic of being something of evidentiary value which the public authorities have caused an arrested person to yield to

them during illegal detention. If one such product of illegal detention is proscribed by the same token all should be proscribed.[14]

Bynum is correct in holding that neither principle nor practice permits an exception to the exclusionary rule to be created for fingerprints. This Court was not speaking loosely when it held in *Mapp* v. *Ohio, supra,* 367 U.S. at 655: "We hold that *all* evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." (Emphasis added)[15]

Were it otherwise, the police could, with impunity, arrest everyone in town,[16] fingerprint them and hope that one set of fingerprints would match. It is just this sort of "ignoble shortcut to conviction," that the Fourth Amendment was expressly designed to prohibit (*Mapp* v. *Ohio, supra,* 367 U.S. at 660).

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[14] At Bynum's retrial, a set of his fingerprints taken under earlier, legal circumstances was introduced into evidence and upheld on appeal. 274 F.2d 767 (D.C. Cir. 1960).

[15] It cannot be doubted that fingerprints are "testing procedures [which] plainly constitute searches of 'persons' and depend antecedently upon seizures of 'persons' within the meaning of [the Fourth] Amendment" (*Schmerber* v. *California,* 384 U.S. at 767).

[16] Of course, the police did not arrest everyone in town in this case—only 65-70 Negro boys. Here, as in *Lankford* v. *Gelston,* 364 F.2d 197, 204 (4th Cir. 1966), "[t]he invasions so graphically depicted in this case 'could' happen in prosperous suburban neighborhoods, but the innocent know only that wholesale raids do not happen elsewhere and did happen to them. Understandably, they feel that such illegal treatment is reserved for those elements who the police believe cannot or will not challenge them."

Conclusion

"If the police, as representatives of organized society, are to be deprived of every effective means of protecting the community against the modern day criminal, nothing will remain for the citizen, save to convert his home into a fortress, and to go armed for his own and his family's protection." With these words, the court below sought to justify its holding (A. 61; 204 So.2d at 276-77). But nothing in petitioner's position is inconsistent with the needs of effective *and* legitimate law enforcement. Were the records of the cases of the 65-70 innocent victims of the police dragnet before the Court, they would remove any doubt as to the illegitimacy of the police conduct at issue here. But it is in the nature of cases involving police practices that the innocent—those who will bear the major consequences of the rules of constitutional law which this Court establishes—are those this Court will never see. They must bear silent witness to the principle that "[l]aw observance by the police cannot be divorced from law enforcement" (*Lankford* v. *Gelston*, *supra*, 364 F.2d at 204). In that divorce lies neither justice nor security, for "[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse,

its disregard of the charter of its own existence". (*Mapp v. Ohio, supra,* 367 U.S. 659).

Respectfully submitted,

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